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IN THE

Supreme Court of the United States

October Term, 1959

No. 455

ALEXANDER FUDEMAN,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

ABRAHAM MINKER,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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COUNTERSTATEMENT OF THE CASE

The Statement of the Case as presented in the Petition is essentially correct, except as follows:.

While neither Petitioners nor their counsel were present at the examination of the grand jurors which was conducted in open court prior to their being sworn as jurors and charged by the court, and while no formal notice thereof had been served on Petitioners or their counsel, counsel had actual notice that the jurors had been summoned to reconvene and of the date and time thereof (A61). The presiding judge fully charged the grand jurors on their duty to consider the cases which would be presented to them solely upon the basis of the evidence presented under oath and not upon that of any extraneous influence which might have been brought to bear upon them or any one of them.

Both the Supreme and the Superior Courts of Pennsylvania heard full argument of the cases on the merits as well as on the procedural question. See full discussion of the merits in the opinion of the Supreme Court of Pennsylvania (A1-5); the dissenting opinion in the Supreme Court of Pennsylvania (A10,42), and the dissenting opinions in the Superior Court of Pennsylvania (A46-57).

REASONS FOR DENYING THE WRIT

The Petition raises no federal question of substance (Rule 19).

I.

The first question presented virtually answers itself, so specious is the contention that there is a denial of the equal protection of the law where a State court admits of exceptions to a fundamental procedural rule but determines after full hearing that a given litigant has failed to bring himself within the exceptions. As rationally one might argue that this Court because it has granted petitions for certiorari denies equal justice to those whose petitions it refuses.

The pen which writes an opinion supporting such a proposition will delete judicial discretion from the entire body of the law.

II.

Petitioners contend that the unauthorized and even unlawful communications from one member of the grand jury to another, advocating action favorable to the Petitioners, followed by an interview by State Policemen of the juror to whom the communications were directed, were presumptively prejudicial. Yet all the jurors when examined under oath in open court answered that no extraneous influences would be permitted to influence their decision. Further, the jurors were specifically and fully charged by the presiding judge to base their findings exclusively on the evi-

dence which would be presented to them in the grand jury room (A61-62).

It cannot be over-emphasized that all the foregoing took place *before* the jurors retired to receive evidence for the first time in the cases at bar.

This Court said in *United States ex rel. Darcy v. Handy*, 351 U. S. 454, 462 (1956):

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'"

Remmer v. United States, 350 U. S. 377 (1956), and *Gold v. United States*, 352 U. S. 985 (1957), are urged by Petitioners as dispositive of the cases at bar. It is submitted that they are not.

Apart from the overriding consideration that the *Remmer* and *Gold* cases were ones of *federal* jurisdiction in which this Court was exercising its appellate jurisdiction over *federal* courts and declaring the applicable *federal* law, it is submitted that the rationale of those cases is here inapplicable for two additional reasons. Firstly, those juries were trial juries, requiring unanimity amongst their members for a verdict, whereas the jury in question was a grand jury which might indict upon agreement of only twelve of its members. Secondly, the extraneous influences in the cited cases were brought to bear *after* the respective trials were under way, while the jurors

in the instant case were examined and fully instructed —collectively and in open court—*before* they received any evidence or were given the cases for consideration. Clearly, any possible doubts, fears or reservations were thereby dispelled in advance of hearing evidence and deliberating.

In *Costello v. United States*, 350 U. S. 359, 363 (1956), this Court held:

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

Neither, it is submitted, does the Fourteenth.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for a Writ of Certiorari to review the decisions of the Supreme Court of Pennsylvania.

Respectfully submitted,

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